Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Developing a Unified Intercarrier Compensation Regime | ) | CC Docket No. 01-92 |
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To: The Commission

# COMMENTS OF NEXTEL PARTNERS, INC. ON FURTHER NOTICE OF PROPOSED RULEMAKING

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## SUMMARY

Nextel Partners has a strong interest in ensuring fair competition and efficient regulatory policies. These principles are best served by the adoption of a bill-and-keep system of intercarrier compensation. The bill-and-keep approach is competitively neutral and will reduce the substantial administrative and financial resources currently spent negotiating and arbitrating reciprocal compensation rates, measuring and billing traffic, and processing and auditing bills. The current intercarrier compensation system also allows carriers to shift costs to their competitors based on how they are regulated. This violates the principle of competitive neutrality, and as noted by the Staff of the Wireline Bureau, distorts the pricing signals received by consumers. The Commission can and should eliminate these inefficiencies by establishing a bill-and-keep regime in which carriers recover the costs of terminating calls from their own customers rather than from other carriers. For all of these reasons, and the other reasons identified in the CTIA Proposal and the Report of the Staff of the Wireline Bureau, the Commission should adopt a unified regime based on bill-and-keep.

If the Commission does not act immediately to implement a unified bill-and-keep regime, Nextel Partners supports incremental action that will move carriers closer to bill-and-keep and reduce reliance on intercarrier compensation. Specifically, Nextel Partners recommends that the Commission reaffirm that its Rule 51.701(b)(2) requires a LEC to pay reciprocal compensation for all land-to-mobile calls that originate and terminate in the same MTA. This has been the law for nearly ten years, and has been confirmed through the arbitration process and

the federal courts. If the Commission were to except IXC-routed calls from reciprocal compensation, many ILECs would demand land-to-mobile traffic ratios approaching 0%. This is inconsistent with the statutory mandate of "reciprocal compensation," would make it harder to show a balance of traffic under 47 C.F.R. § 51.713, and would give carriers more incentive to arbitrate over small disagreements in rates. Moreover, if IXC-routed intraMTA land-to-mobile calls are excluded from reciprocal compensation, CMRS providers' termination costs will be left uncompensated. If Nextel Partners must continue to pay compensation for its intraMTA calls, it should be allowed to continue to offset those charges with reciprocal termination services it is providing in the same local area.

The Commission should also find that end office switching costs are no longer usage-sensitive and cannot be recovered within reciprocal compensation rates. This is fully consistent with the state of forward-looking technology, and remains true to the concept of "cost causation" that the Commission determined would assist the development of equitable local competition. It is also required by Section 252(d)(2), which provides that reciprocal compensation rates must equal the "additional costs" of call termination. If there are no additional end office switching costs created by usage, no additional usage costs should be assessed. A Commission determination that switch costs are not "additional costs" of call termination will assist the Commission in moving towards a unified regime that relies less on the ability to generate intercarrier compensation and more on the ability to generate customer revenues.

The Commission should also reaffirm the principle of local dialing parity that is central to local competition. Nextel Partners has found that many rural telephone companies do not view local dialing parity as a statutory obligation, and instead regularly deny local dialing parity as a means to gain leverage in carrier negotiations. This is inconsistent with the Commission's Rules and represents the use of monopoly power to hurt captive customers and discourage competition. The Commission should strongly reaffirm this fundamental principal of competition. Rural telephone companies in many states have simply refused to honor Nextel Partners' numbers that are assigned within a mandatory local calling area. These carriers generally claim that dialing parity obligations apply only once there is an interconnection agreement, and they seek to compel Nextel Partners to sign an interconnection agreement with an unreasonable rate or unreasonable terms by withholding dialing parity until an agreement is finalized. These carriers hurt their own customers (who are being charged toll rates for what should be local calls), and are preventing Nextel Partners from participating as a local competitor under the clear rules mandated by Congress and the Commission. It is imperative that the Commission affirm that LEC call rating practices – which determine whether a customer must dial extra digits or pay extra charges – must be consistent with local dialing parity. This means that the LEC "must ensure" that all numbers rated within a landline local calling area are given the same call rating. The Commission should also strongly reaffirm that dialing parity is not a requirement that arises only upon the negotiation of an interconnection agreement.

Nextel Partners believes the Commission's current rules require an originating carrier to make the necessary arrangements to bring a call to the terminating carrier's network, but that rural LEC attempts to avoid this obligation have inhibited competition in rural areas. Whether the Commission makes incremental changes to the current regime or adopts a new unified regime, it should ensure that each carrier is obligated to pay the cost of bringing a call to the terminating carrier's network. In this regard, Nextel Partners supports the Western Wireless proposal that each carrier be allowed to designate a network "Edge" within a LATA. This will maintain the level playing field that exists in the current rules, and limiting the transport obligation within a LATA will ensure that originating LECs are not required to undertake unreasonable levels of transport on local calls.

Finally, Nextel Partners supports Commission policies that have encouraged carriers to look more to their own customers, and less to other carriers, for revenue. As reciprocal compensation rates have gone down, ILECs have increasingly attempted to increase intercarrier compensation revenues from CMRS providers through the use of negotiated "interMTA factors" that estimate the amount of CMRS-LEC traffic subject to access charges. If the Commission does not conduct a wholesale reform of access charges, it should make two clarifications that will prevent LECs from seeking unreasonable interMTA factors as parties negotiate interconnection agreements.

First, the Commission should clarify that land-to-mobile interMTA calls that are dialed and delivered locally are not subject to the access charges of either carrier. In these cases, neither party is purchasing an access service from the other, and such calls were not historically subject to access tariffs. Thus, as a policy matter, there is no reason to incent carriers to rely on access revenue when no access service is being provided. The landline carrier should recover its loop and switching costs from its exchange customer, and the CMRS provider should recover its roaming and termination costs from its customer. Second, the Commission should clarify that all interMTA CMRS-LEC traffic is subject to <u>interstate</u> access charges, even if the call is physically intrastate. To the extent that a CMRS provider is providing a long-distance service and needs to purchase "access" to a LEC network, it is clearly doing so as a federally-regulated carrier. <u>Intrastate</u> access tariffs simply cannot apply to such traffic.

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# COMMENTS OF NEXTEL PARTNERS, INC. ON FURTHER NOTICE OF PROPOSED RULEMAKING

Nextel Partners, Inc. hereby submits its comments on the *Further Notice of Proposed Rulemaking* ("*Further NPRM*")[1] in the above captioned proceeding. Nextel Partners recognizes the need to replace existing intercarrier compensation regimes with a unified regime that works hand-in-hand with the Commission's universal service policies. These needs can best be met through the adoption of a bill-and-keep system of intercarrier compensation. Bill-and-keep is competitively neutral, will reduce administrative costs, and correctly recognizes that both the calling party and called party benefit when a call is made. For these reasons, Nextel Partners generally supports the proposal made by CTIA – The Wireless Association to move quickly to a unified regime based on bill-and-keep.

If the Commission does not act immediately to implement a unified regime, Nextel Partners supports incremental action that will move carriers closer to bill-and-keep and reduce reliance on intercarrier compensation. Nextel Partners is also

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[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, Further Notice of Proposed Rulemaking, FCC 05-33, 2005 WL 495087 (March 3, 2005) ("*Further NPRM*").

concerned that during any transition period the Commission stand by its legal and policy decisions that were designed to facilitate vibrant competition in the mid-sized and rural service areas in which Nextel Partners operates. These policies remain essential to achieve the goals of the 1996 Act, and should be reaffirmed by the Commission in this proceeding.

## I. NEXTEL PARTNERS' SERVICE AREAS

Nextel Partners comes to this proceeding as a relatively new entrant that provides competitive telecommunications services in mid-sized and rural service areas. Nextel Partners was formed as a separate publicly-traded company in 1999 through a cooperative venture with Nextel Communications, Inc. ("Nextel Communications") for the purpose of facilitating and expediting the buildout of wireless service to parts of the United States that are primarily outside of the 100 largest metropolitan statistical areas ("MSAs"). Nextel Partners' primary business focus is to provide digital wireless mobile communication services in mid-sized and smaller markets, including historically underserved and rural markets throughout the United States.

Through its cooperative arrangements with Nextel Communications, Nextel Partners brings to its customers in high cost rural areas and smaller markets the same national network and the same fully integrated four-in-one bundle of services available from Nextel Communications in urban areas. These services include (i) digital cellular, (ii) text/numeric messaging, (iii) Nextel Wireless Web services and (iv) Nextel Direct Connect digital two-way radio in a single phone. Nextel Partners provides these advanced digital wireless communications services over an industry leading 2.5G nationwide network. Pursuant to agreements between the companies, both Nextel Partners and Nextel Communications provide their services under the Nextel® brand name, and customers of both companies are provided cost-free roaming onto the other company's network, so that both companies' customers are afforded service over a seamless national network.

Since its inception as a startup entity in 1999, Nextel Partners has rapidly deployed an extensive network within its license service territory. During its first five years of operation, Nextel Partners completed the buildout of all of the medium-sized markets and many of the tertiary and rural areas within its licensed territory, as well as the major highway corridors running between populated areas. At the time of its formation in 1999, Nextel Partners served fewer than 50,000 customers in a small number of markets. Today, Nextel Partners serves over 1.7 million customers in 31 states, operates more than 4,000 cell sites and its system covers more than 54,000,000 POPs.

As a competitive rural provider of commercial mobile radio service ("CMRS"), Nextel Partners originates traffic to and terminates traffic from large ILECs, rural ILECs, CLECs, and other CMRS providers. Nextel Partners has a significant interest in ensuring fair competition and efficient regulatory policies in these rural service areas.

## II. <u>RECIPROCAL COMPENSATION PRINCIPLES AND RATES</u>

### A. <u>The Commission Should Adopt A Unified Regime Based on Bill-and-Keep</u>

Nextel Partners supports intercarrier compensation policies that promote efficiency and competition. These principles are best served by a regime based on bill-and-keep among all telecommunications carriers. Nextel Partners thus supports the CTIA proposal and the analysis of the Staff of the Wireline Competition Bureau.[2] A bill-and-keep regime would significantly reduce administrative costs that are built into the current system. Today, most carriers spend a great deal of administrative and financial resources negotiating and arbitrating reciprocal compensation rates, measuring and billing traffic, and processing and auditing bills. These costs are even more significant for a carrier like Nextel Partners that provides service in rural areas in competition with over 1,000 rural ILECs. These costs are only increasing as more and more carriers – including rural ILECs and CLECs – seek to open interconnection negotiations and establish formal billing arrangements. The Commission has an opportunity to eliminate these inefficiencies by establishing a bill-and-keep regime in which carriers recover the costs of terminating calls from their own customers rather than from other carriers.

Nextel Partners also supports bill-and-keep because it is competitively neutral. As technology and competition have evolved, customers care less about regulatory distractions and more about how well the provider delivers the

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[2] *Further NPRM*, Appendix C.

communications service that is being provided. This is especially true now that voice service is often just one of a bundle of services that is being marketed to consumers. Customers seek value in these bundled packages, without focusing on the way in which one of those services is regulated. The current intercarrier compensation system allows carriers to shift costs to their competitors based on how they are regulated. This violates the principle of competitive neutrality, and as noted by the Staff of the Wireline Bureau, distorts the pricing signals received by consumers. *Further NPRM*, App. C. Bill-and-keep would solve this problem.

Bill-and-keep is also supported by the fact that telecommunications customers today pay for the opportunity to both make and receive phone calls. This justifies a regulatory regime in which a customer is expected to pay the cost of call termination. The Staff of the Wireline Bureau correctly notes that communication is by definition a two-way street that occurs only when two parties decide to "exchange information." *Further NPRM*, App. C. The Commission has already recognized in other contexts that customers value and pay for the right to receive calls. *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd. 13192, 13196, ¶ 15 (2002) ("*Sprint PCS Access Charge Order*") ("Second, there is a benefit to customers of both IXCs and CMRS carriers when CMRS carriers terminate IXC traffic. Because both carriers charge their customers for the service they provide, it does not necessarily follow that IXCs receive a windfall in situations where no compensation is paid for access service provided by a CMRS carrier.")

(footnote omitted); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCCR 8776, ¶ 63 (1997) (defining "voice grade access to the public switched network" to encompass the network facilities necessary to make <u>and receive</u> telephone calls). Thus, a bill-and-keep regime would appropriately allocate call termination costs to the end user receiving the call.

For these reasons, and the other reasons identified in the CTIA Proposal and the Report of the Staff of the Wireline Bureau, the Commission should adopt a unified regime based on bill-and-keep.

### B. <u>Transition Reciprocal Compensation Policies Should Continue to Move Carriers Towards Bill-and-Keep</u>

In the event that the Commission does not adopt a unified regime, or during any transition period that may be necessary, the Commission should take incremental action that will move the industry closer to bill-and-keep. Since 1996, the Commission has consistently taken regulatory action that has reduced carriers' reliance on intercarrier compensation, including:

* Reducing interstate access charges;
* Adopting TELRIC methodology;
* Creating an opt-in compensation regime for ISP-bound traffic that reduced reciprocal compensation payments to RBOCs;
* Prohibiting CMRS providers from assessing termination charges on IXCs; and
* Prohibiting LECs from assessing tariff charges on intraMTA CMRS traffic.

If the Commission does not establish a unified bill-and-keep regime it should take incremental action that carries this trend forward, including:

* Maintaining the MTA Rule for all traffic to or from a CMRS network;
* Designating all or most switching costs as non-usage sensitive and recoverable through fixed charges; and
* Clarifying the application of access rates to interMTA CMRS traffic.

These issues are discussed below.

### C. All Land-to-Mobile IntraMTA Traffic is Subject to Reciprocal Compensation

In its *First Report & Order*, the Commission established rules to govern reciprocal compensation between CMRS providers and LECs:

> [I]n light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under Section 251(b)(5)…. <u>Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges</u>.

*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, ¶ 1036 (1996) ("*First Report & Order*") (emphasis added). *See also id.* ¶ 1043 ("We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges."). The Commission incorporated this "MTA standard" into Rule 51.701(b)(2).

The Commission modified its reciprocal compensation rules slightly in 2001 as it considered the application of these rules to traffic destined to Internet service providers. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶ 46 (2001). The Commission stated, however, that this modification did not change reciprocal compensation obligations for traffic between CMRS and LEC networks. *Id.* ¶ 47. As Rule 51.701 currently reads, reciprocal compensation obligations apply to "telecommunications traffic," defined as:

> (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access . . . .
>
> (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined by § 24.202(a) of this chapter.

47 C.F.R. § 51.701(b).

The three federal courts that have analyzed Rule 51.701 have interpreted it to require a LEC to pay reciprocal compensation for all intraMTA traffic destined to a CMRS network, even if the call is routed by the LEC via interexchange carrier ("IXC"). The 10th Circuit Court of Appeals held:

> We hold that the mandate expressed in these provisions is clear, unambiguous, and on its face admits of no exceptions. The RTCs in the instant case have a mandatory duty to establish reciprocal compensation agreements with the CMRS providers, *see Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (noting that the term "shall" connotes a mandatory, as opposed to permissive, requirement), for calls originating and terminating within the same MTA. Where the regulations at issue are unambiguous, our review is controlled by their plain meaning. *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001). Nothing in the text of these provisions provides support for the RTC's

> contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network.

*Atlas Tel. Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256, 1265 (10th Cir. 2005). This ruling affirmed the lower court's ruling that:

> Thus, although the FCC was clearly aware of the issues created when access calls are exchanged, as evidenced by the exemption from reciprocal compensation obligations for LEC-to-LEC access calls under § 51.701(b)(1), the FCC did not create a similar exception for LEC-to-CMRS access calls which originate and terminate within the same major trading area. 47 C.F.R. § 51.701(b)(2).

*Atlas Tel. Co. v. Corporation Comm'n of Okla,* 309 F.Supp.2d 1299, 1310 (W.D. Okla. 2004). The United States District Court for the District of Nebraska agrees as well:

> Thus, as a matter of federal law, the [Nebraska] Commission erred in ruling that Great Plains owed no reciprocal compensation to Western Wireless for calls originated by Great Plains and terminated by Western Wireless within the same MTA, whether or not the call was delivered via an intermediate carrier.

*WWC License, L.L.C. v. Boyle et al.*, Case No. 4:03CV 3393, Mem. Op., p. 6 (D. Neb. Jan 20, 2005).

Notwithstanding this very clear rule and definitive case law, many LECs continue to argue that land-to-mobile calls originating and terminating within an MTA are excluded from reciprocal compensation obligations if they are routed by the LEC via IXC. Recognizing these arguments, the Commission asked for comment as to whether the rule should be interpreted as proposed by these LECs. *Further NPRM*, ¶ 137.

The Commission should reaffirm that the MTA rule requires a LEC to pay reciprocal compensation for all land-to-mobile calls that originate and terminate in the same MTA. This has been the law for nearly ten years, and has been confirmed through the arbitration process and the federal courts. The Commission cannot in this proceeding "interpret" Rule 51.701 to achieve a substantively different result than that required by a plain reading of the text. *See United Telecom Assoc. v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (the adoption of a new position inconsistent with an existing rule is not interpretive – it is substantive and requires a legislative rule).

This application of the MTA rule makes sound policy sense. Nextel Partners provides competitive service – and has customers – in many areas where it does not have number blocks assigned to the local landline rate center. In these cases, customers of LECs generally must dial "1+" and pay toll charges to reach Nextel Partners' numbers, even if the called party resides and is located in the same rate center. If Rule 51.701(b) were amended to exclude IXC-routed calls from the reciprocal compensation rules, Nextel Partners would be required to pay reciprocal compensation for mobile-to-land calls, but would not receive reciprocal compensation payments for land-to-mobile calls. It would be inequitable and anti-competitive to deny a local competitor this access to *reciprocal* compensation for call termination.[3] Further, the only apparent solution would be for every competitive

[3] It is clear that the goal of many ILECs is to collect reciprocal compensation but pay no reciprocal compensation. In the rural ILEC-CMRS arbitration in Oklahoma, the ILECs argued that based on their interpretation of Rule 51.701 there was no land-to-mobile traffic that was subject to compensation. *Atlas Tel. Co. v. Corp. Comm'n of Okla.*, 309 F. Supp. 2d 1299, 1310 (W.D. Okla. 2004). A rural ILEC in Nebraska made the same argument, as did ILECs in Illinois. *WWC License, L.L.C. v. Boyle et al.*, Case No. 4:03CV3393, Mem. Op., p. 6 (D. Neb. Jan 20, 2005) (state

wireless provider to maintain number blocks in every landline rate center. This is an inefficient and unnecessary use of numbering resources, and would inappropriately require members of the highly successful competitive wireless industry to engineer networks and business plans around landline exchange boundaries.

Maintaining the integrity of the MTA standard will allow the Commission to continue moving towards bill-and-keep. Most CMRS-LEC interconnection agreements provide that LECs send net bills based on an agreed-to assumption that some percentage (often times 30%) of total traffic is land-to-mobile. If the Commission were to except IXC-routed calls from reciprocal compensation, many ILECs would demand traffic land-to-mobile ratios approaching 0%. This is inconsistent with the statutory mandate of "reciprocal compensation," would make it harder to show a balance of traffic under 47 C.F.R. § 51.713 with more net billable minutes, and carriers would be more likely to arbitrate over small disagreements in rates.

Finally, Nextel Partners (as other wireless carriers) has only one real source of terminating compensation – originating LECs. In its *Sprint PCS Access Charge Ruling*, the Commission denied CMRS providers the ability to assess call

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commission improperly found that no land-to-mobile calls were subject reciprocal compensation); *Verizon Wireless v. Adams Tel. Coop.*, Illinois Commerce Comm'n, Docket No. 04-0040, p. 6, 8 (Apr. 7, 2004) (rejecting ILECs arguments that no land-to-mobile traffic is subject to reciprocal compensation). Relieving these rural monopoly carriers from reciprocal compensation obligations is directly contrary to the goal of breaking down monopoly markets and bringing competition to all areas of the nation.

termination charges on IXCs. While the Commission found that IXCs could agree to pay for call termination, the reality is that without an enforceable right to assess such charges, no such agreements are formed. *Sprint PCS Access Charge Ruling,* ¶ 8. Thus, if IXC-routed intraMTA land-to-mobile calls are excluded from reciprocal compensation, those termination costs will be left uncompensated. If Nextel Partners must continue to pay compensation for its intraMTA calls, it should be allowed to continue to offset those charges with reciprocal termination services it is providing in the same local area.

In conjunction with this question, the Commission asked whether LECs should be able to charge access to IXCs when land-to-mobile calls are routed via IXC and subject to reciprocal compensation rules. *Further NPRM*, ¶¶ 137-38. This is a question that is resolved with reference to local dialing parity requirements, not with reference to reciprocal compensation rules. Unless local dialing is required by dialing parity – an issue that is discussed below – there is no prohibition on the LEC routing an intraMTA call via IXC subject to state or federal access tariffs. This is fully consistent with industry practice nationwide.

Nextel Partners requests that the Commission reaffirm its MTA rule so that LECs remain obligated to pay reciprocal compensation for intraMTA calls, whether or not such calls are routed via IXC.

### D. <u>The Commission Should Assign End Office Switching Costs to the User of the Loop</u>

In its *First Report & Order*, the Commission implemented Section 251(b)(5) by requiring that arbitrated reciprocal compensation rates could recover only those usage-sensitive costs that are caused by a competitor's call. *First Report & Order*, ¶¶ 1056-57. The Commission made clear that the cost of a loop – which does not vary based on usage – was not caused by usage and could be recovered within reciprocal compensation rates. *Id.* ¶ 1057. This sound policy decision required an ILEC to recover its non-usage based loop costs from its customer who purchased the line (as supplemented by available universal service subsidies) rather than through per minute termination charges paid by local competitors. For switching, the Commission determined that a portion of switch costs would be recovered through usage-based reciprocal compensation charges because some switch costs vary based on usage, while others do not. *Id.* ¶ 810; 47 C.F.R. § 51.509(b).

Switch technology has changed significantly since 1996. As the Commission recognized in its *Further NPRM*, there is evidence that forward-looking end office switches are priced based on the number of lines they serve rather than the number of minutes processed by the switch. *Further NPRM*, ¶¶ 23, 66-68. A simple investigation shows this to be true for switches typically purchased by rural telephone companies. The technical documentation for a Nortel DMS 10, for example, identifies its capacity based on the number of lines served. *See* Attachment A. Because of the significant increase in computer processing power that has occurred over the past ten years, rural LEC switches are purchased and engineered based on the number of lines, and forward-looking end office switching costs are simply not based on competitors' call termination.

The Commission should find – much as it did for loop costs in the *First Report & Order* – that end office switching costs are no longer usage-sensitive and cannot be recovered within reciprocal compensation rates. This is fully consistent with the state of forward-looking technology, and remains true to the concept of "cost causation" that the Commission determined would assist the development of equitable local competition. It is also required by Section 252(d)(2), which requires that reciprocal compensation be paid for the "additional costs" of call termination. 47 U.S.C. § 252(d)(2)(A)(ii). If there are no additional end office switching costs created by usage, no additional costs should be assessed.

A Commission determination that switch costs are not "additional costs" of call termination will assist the Commission in moving towards a unified regime that relies less on the ability to generate intercarrier compensation and more on the ability to generate customer revenues. Requiring carriers to recover end office switching costs from customers (as supplemented by universal service support that recognizes the high per-customer cost of switching in sparsely-populated areas) is efficient, pro-competitive, and consistent with 47 U.S.C. § 252(d)(2).

## III. THE COMMISSION MUST ENSURE DIALING PARITY

Both Congress and the Commission have recognized that local dialing parity is fundamental to local competition. Section 251(b)(3) of the Act requires LECs to provide dialing parity to competitive providers of telephone exchange services. 47 U.S.C. § 251(b)(3). The Commission implemented this statutory mandate with a Rule that provides:

> A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identify of the customer's or the called party's telecommunications service provider.

47 C.F.R. § 51.207. The Commission assured CMRS providers that they would obtain the benefits of local dialing parity:

> To the extent that a CMRS provider offers telephone exchange service, such a provider is entitled to receive the benefits of local dialing parity. . . . [W]e find that under section 251(b)(3) each LEC must ensure that its customers within a defined local calling area be able to dial the same number of digits to make a local telephone call notwithstanding the identity of the calling party's or called party's local telephone service provider.

*In The Matters Of Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd. 19392, ¶¶ 64-68 (1996) ("*Second Report and Order*").

Nextel Partners has found that many rural telephone companies do not view local dialing parity as a statutory obligation, and instead regularly deny local dialing parity as a means to gain leverage in carrier negotiations. This is inconsistent with the Commission's Rules, and represents the use of monopoly power to hurt captive customers and discourage competition. The Commission should strongly reaffirm this fundamental principal of competition.

In 2003, Nextel Partners entered into an agreement with a college in New York to provide service to its students. Nextel Partners did not have a block of numbers rated to the landline exchange, but did have two 1000 blocks within a 10,000 number block in an adjacent exchange that was part of an extended area service ("EAS") mandatory local calling area. This number block had historically been provided local dialing parity throughout that EAS area. As Nextel Partners prepared to assign numbers to its new customers, the underlying ILEC (apparently upset over losing those customers) reprogrammed its switch so that its landline customers could not reach the Nextel Partners numbers within that 10,000 block on a local basis. As a result, calls from the landline phones at the college to students of the school using Nextel Partners' service would have been toll calls, even though the numbers were in an EAS area. Nextel Partners believes this was a clear violation of the ILEC's obligation to "ensure that its customers within a defined local calling area [are] able to dial the same number of digits to make a local telephone call notwithstanding the identity of the calling party's or called party's local telephone service provider." *Second Report & Order*, ¶ 68. This discrimination, and the threat of this continued disruption, compelled Nextel Partners to immediately enter into an interconnection agreement with disadvantageous terms and rates.

This is by no means an isolated incident. Nextel Partners has had rural telephone companies in many states simply refuse to honor Nextel Partners' numbers that are assigned within a mandatory local calling area. These carriers generally claim that dialing parity obligations apply only once there is an interconnection agreement. Their goal appears to be to compel Nextel Partners to sign an interconnection agreement with an unreasonable rate or unreasonable terms by withholding dialing parity until an agreement is finalized. These carriers hurt their own customers (who are being charged toll rates for what should be local calls), and are preventing Nextel Partners from participating as a local competitor under the clear rules mandated by Congress and the Commission.

The Commission has asked for comment on the rating of land-to-mobile traffic where numbers are within a landline rate center. *Further NPRM*, ¶¶ 141-143. The Commission did not, however, discuss the local dialing parity obligations imposed on LECs in Section 251(b)(3) and 47 C.F.R. § 51.207.[4] It is imperative that the Commission affirm that LEC call rating practices – which determine whether a customer must dial extra digits or pay extra charges – must be consistent with local dialing parity. This means that the LEC "must ensure" that all numbers rated within a landline local calling area are given the same call rating.

The Commission should also strongly reaffirm that dialing parity is not a requirement that arises only upon the negotiation of an interconnection agreement. The obligations in Rule 51.207 and the *Second Report & Order* are not conditioned on an agreement,[5] nor was this the Commission's intent.[6] Such a construction

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[4] Footnote 401 of the *Further NPRM* refers to a petition by ASAP Paging. Paging service is a one-way service that would not appear to constitute "telephone exchange service," and would not be subject to dialing parity requirements. *See First Report & Order*, ¶ 1013.

[5] *See In the Matter of TSR Wireless, L.L.C., et al., v. US West Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, 15 FCC Rcd. 11166 (June 21, 2000) (obligation that is not conditioned on the interconnection negotiation process is automatically enforceable), *aff'd*, *Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[6] In fact, the Commission interpreted Section 251(b)(3) to require LECs to provide dialing parity to providers of telephone exchange or toll service "with respect to all telecommunications services that require dialing to route a call and encompasses international, interstate, intrastate, local and toll services." *Second Report & Order*, ¶ 377.

would further render Section 251(b)(3) meaningless as applied to CLECs, which are not required to participate in the mandatory interconnection arbitration process under Section 252.[7]

The Commission has correctly noted that a LEC "may have the incentive to engage in [improper call rating] for a variety of reasons, including increased access revenue, reduced reciprocal compensation payments, and less significant transport obligations." *Further NPRM*, ¶ 142. None of these reasons could possibly justify the violation of Rule 51.207, the abuse of monopoly power, and the harm to consumers that occurs when LECs ignore dialing parity requirements. The Commission should reaffirm that ILEC call rating questions must be resolved consistent with dialing parity, that LECs have a non-negotiable obligation to ensure local dialing, and that a LEC's failure to ensure local dialing to all numbers within a local calling area is a clear violation of Commission Rule 51.207.

## IV. ILECS MUST TAKE RESPONSIBILITY TO DELIVER CALLS ORIGINATED BY THEIR CUSTOMERS

The Commission has asked for comment on issues related to the location of a point of interconnection, or POI, between two carriers, as well as the allocation of transport costs. *Further NPRM*, ¶ 91. Nextel Partners believes the Commission's current rules require an originating carrier to make the necessary arrangements to bring a call to the terminating carrier's network, but that rural LEC attempts to

[7] In other words, because only incumbent LECs can be the subject of formal requests for negotiation under Section 252, conditioning Section 251(b)(3) obligations on participation in the Section 252 process would relieve CLECs of any local dialing parity obligations.

avoid complying with this obligation have inhibited competition in rural areas. Whether the Commission makes incremental changes to the current regime or adopts a new unified regime, it should ensure that each carrier is obligated to pay the cost of bringing a call to the terminating carrier's network.

The Commission has described the current regime as based on the principle that the "calling party's network pays." *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶ 9 (2001). For Nextel Partners, that means that if its customer originates a call destined to a LEC customer, Nextel Partners must deliver that call to the appropriate LERG routing point for that number. To accomplish that Nextel Partners must: 1) deliver the call over its own purchased or leased facilities, 2) pay an RBOC to perform a transiting service to reach the terminating LEC, or 3) pay a wholesale IXC to deliver the call. Nextel Partners decides which of these alternatives is consistent with its own "most efficient technical and economic choices" (*First Report & Order*, ¶ 997) and takes financial responsibility to deliver the call. In many cases, this requires Nextel Partners to arrange for a call to be delivered beyond its service territory, and beyond its network boundary.

For land-to-mobile calls received by Nextel Partners, the Commission's rules similarly require the originating carrier to take responsibility to deliver a call to the terminating wireless carrier's network. Where the parties are directly interconnected, a call can be delivered over that existing facility. Where there is no direct connection, however, the landline carrier that originated the call is responsible for arranging to have the call delivered to the wireless network. This may, in some cases, be accomplished through the services of an IXC (so long as that is consistent with local dialing parity obligations). Otherwise, the landline carrier must arrange with a transit carrier or wholesale provider to bring the call to the terminating wireless network.[8]

Courts have construed the Commission's existing rules to require an originating LEC to deliver a call to a terminating network. The Tenth Circuit Court of Appeals and the Federal District Court for the District of Nebraska have ordered that CMRS-LEC interconnection agreements must require the LEC to take financial responsibility for delivering traffic to the local competitor. *Atlas Tel. v. OCC*, 400 F.3d 1256, 1268 (10th Cir. 2005); *WWC License, L.L.C. v. Boyle et al.*, Case No. 4:03CV 3393, Mem. Op., p. 10 (D. Neb. Jan 20, 2005). This is fully consistent with FCC Rule 51.703(b), which prohibits the originating LEC from shifting its own costs to the terminating carrier. *See Mountain Communications, Inc. v. Fed. Communications Comm'n*, 355 F.3d 644, 649 (D.C. Cir. 2004) ("Mountain Communications"); *MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 881 (4th Cir. 2003).

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[8] Alternatively, if the ILEC wishes to establish a one-way facility to deliver calls directly, the ILEC could request that a CMRS provider allow interconnection within the CMRS provider's network.

The Commission has recognized that its interconnection rules require the originating LEC to bear the cost of bringing a call to the terminating carrier's network:

> Rural LECs thus always have been required to deliver traffic to other carriers through direct or indirect interconnection - even when a wireless carrier's switch is not located in the rural LEC's rate center. The FCC's LEC/CMRS interconnection rules were upheld in Iowa Utilities Board v. FCC, 120 F.3d 753, 800 n.21 (8th Cir. 1997), and this Court has rejected efforts to attack those rules collaterally. See Qwest Corp. v. FCC, 252 F.3d 462 (D.C. Cir. 2001). It is too late in the day for the intervenors to challenge the Commission's long standing interconnection rules.
>
> …
>
> Section 51.703(b) of the Commission's rules states that a LEC may not assess charges on any other telecommunications carrier, including a CMRS provider, for telecommunications traffic that originates on the LEC's network. See 47 C.F.R. § 51.703(b). The Commission has construed this provision to mean that an incumbent LEC must bear the cost of delivering traffic (including the facilities over which the traffic is carried) that it originates to the point of interconnection ("POI") selected by a competing telecommunications carrier. At least two federal appellate courts have held that this rule applies in cases where an incumbent LEC delivers calls to a POI that is located outside of its customer's local calling area.

*United States Telecom Ass'n, et al. v. Federal Communications Commission*, Nos. 03-1414, 03-1443, 2004 WL 3190579 Brief for Federal Communications Commission (Sept. 1, 2004) (footnotes omitted).

As the Commission develops a unified regime, the Commission should be careful to retain this balance whereby CMRS providers and LECs each have the same obligation to deliver calls to a terminating network. The Intercarrier Compensation Forum proposal for the delivery of a call at the "Edge" of a terminating network relies generally on this concept, but then creates carve-outs based on carrier type and technology that complicate the proposal and will inhibit competition in rural areas that are the most isolated from facilities-based competition. Thus, Nextel Partners supports the Western Wireless proposal that each carrier be allowed to designate a network "Edge" within a LATA. This will maintain the level playing field that exists in the current rules, and limiting the transport obligation within a LATA will ensure that originating LECs are not required to undertake unreasonable levels of transport on local calls.

## V. APPLICATION OF ACCESS CHARGES TO CMRS PROVIDERS

As noted above, Nextel Partners supports FCC policies that have encouraged carriers to look more to their own customers, and less to other carriers, for revenue. As reciprocal compensation rates have gone down, ILECs have increasingly attempted to increase intercarrier compensation revenues from CMRS providers through the use of negotiated "interMTA factors" that estimate the amount of land-to-mobile traffic subject to access charges.[9] If the Commission does not conduct a wholesale reform of access charges, it should make two clarifications that will prevent LECs from seeking unreasonable interMTA factors as parties negotiate interconnection agreements.

### A. Scope of Application of Access Charges

Wireless carriers and LECs generally agree that if a CMRS provider originates a call in one MTA and delivers the call on local trunks to be terminated in another MTA, the LEC should be able to bill the CMRS provider an access charge. Conceptually, the Commission assumed that on a call crossing an MTA boundary, the CMRS provider was offering a long distance service and should buy "access" in order to terminate the call to the LEC customer.[10] Depending on the size

[9] The Commission has endorsed the development of proxy factors to determine the amount of interMTA traffic. *First Report & Order*, ¶ 1044.

[10] If, on the other hand, the wireless carrier engages a wholesale IXC to deliver the call (as on a cross-country call), the access charge is billed to the IXC, and the IXC bills the wireless carrier. These calls do not need to be accounted for in an interMTA factor.

of MTA, the location of the LEC, and how the CMRS provider engineers its network, such interMTA factors generally range from 0%-2%.

The Commission's orders are less clear as to the application of this principle to land-to-mobile interMTA calls that are delivered over local trunks. For example, Nextel Partners has numbers and connectivity in Qwest's Rochester, Minnesota exchange. If a Qwest landline customer in Rochester makes a local call to his wife's Nextel Partners' number, that call is dialed locally and delivered to Nextel Partners over local trunks. Qwest is providing an exchange service to its customer. If the customer's spouse drives south from Rochester to Cedar Rapids, the same call will be dialed locally and delivered over the same local trunks. The call will then be forwarded by Nextel Partners (at its own cost) to the cell site in Cedar Rapids serving its customer. The call will originate in Minneapolis MTA and terminate in the Des Moines MTA.

Some CMRS providers have argued that the Commissions' *First Report & Order* allows the CMRS provider to assess terminating access for a call of this kind. This is problematic because CMRS providers do not set access rates and do not maintain access tariffs. *See Sprint PCS Access Charge Ruling*, ¶ 7. Some LECs, on the other hand, argue that the Commission's *First Report & Order* allows them to charge originating access to the CMRS provider. This has its own set of problems. First, the Commission's *First Report & Order* limits the application of access charges to calls that historically have been subject to access tariffs. *First Report & Order*, ¶ 1043. Landline access tariffs do not apply and never have applied to calls made to locally-rated numbers and delivered over local trunks. Second, the originating LEC is providing an exchange service to its customer – the ability to make a local call within a designated local calling area. The fact that Nextel Partners undertakes to forward that call from the local point of connection to a customer's location does not require it to purchase access from the LEC to terminate the call.

The Commission should clarify that land-to-mobile calls like those described above are not subject to the collection of access charges by either carrier. Neither party is purchasing an access service from the other, and such calls were not historically subject to access tariffs. As a policy matter, there is no reason to incent carriers to rely on access revenue when no access service is being provided. The landline carrier should recover its loop and switching costs from its exchange customer, and the CMRS provider should recover its roaming and termination costs from its customer.

### B. Jurisdiction of Access Charges

The Commission should also clarify that interMTA traffic would be billed at interstate access charges as opposed to intrastate access charges. It is well established that the Commission has jurisdiction under 47 U.S.C. § 332 over interconnection and compensation between LECs and CMRS providers. The Commission exercised this authority in 1994 to establish compensation requirements for all CMRS-LEC traffic, even that which is physically intrastate. *In the Matter of AirTouch Cellular*, Memorandum Opinion and Order, 16 FCCR 13502, ¶ 11 (2001). This placed all LEC-CMRS traffic under federal purview. In 1996, the

Commission implemented Section 251(b)(5) for CMRS-LEC traffic by creating the MTA rule, which broke LEC-CMRS traffic into two categories – interMTA traffic and intraMTA traffic. In both cases, however, the calls remain CMRS-LEC traffic subject to the jurisdiction of the Commission.

The Commission should clarify that mobile-to-land interMTA traffic is subject to <u>interstate</u> access charges rather than intrastate access, even for calls that may be physically intrastate. To the extent that a CMRS provider is providing a long-distance service and needs to purchase "access" to a LEC network, it is clearly doing so as a federally-regulated carrier. Said another way, intrastate access rates can apply only to state-regulated long distance service providers, and CMRS providers do not offer state-regulated long-distance services. *See* 47 U.S.C. § 332(c)(3)(A). If a CMRS provider must obtain access from a LEC, that access service must be regulated by the Commission rather than a state.

Applying state access rates to CMRS traffic would also be troublesome because many states have failed to conduct meaningful intrastate access and universal service reform, and still allow small rural LECs to charge exorbitant, essentially unregulated, state access rates. Moreover, the Commission has failed take action to require states to remove implicit subsidies from access rates, despite clear directives to do so. *See* 47 U.S.C. § 251(d)(3) (preserving state access rates only if they do not prevent implementation of the Act); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1204 (10th Cir. 2001) (Commission is obligated to develop mechanisms that will ensure state participation in achieving goals of universal service). The

Commission cannot incorporate state access rates into a CMRS-LEC compensation regime without ensuring that those rates constitute reasonable compensation (47 C.F.R. § 20.11(b)), and are consistent with the purposes of the Act (47 U.S.C. § 251(d)(3)). Given the status of access reform at the state level, this is not a determination that could be made by the Commission on a nationwide basis.

## CONCLUSION

Nextel Partners respectfully requests that the Commission take action consistent with the views expressed herein.

Respectfully submitted,

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